

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:

JOHN A. MCMORRIS, III ET AL.

Serial No. **10/720,777**

Filing Date: **11/24/2003**

For: **SYSTEM AND METHOD FOR
TRACKING ENVIRONMENTAL
EMISSION REDUCTIONS**

Examiner: **Heidi M. Riviere**

Group Art Unit: **3629**

Attorney Docket No. **35539**

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

DECLARATION OF JOHN A. MCMORRIS, III

UNDER 37 CFR § 1.132

I, John A. McMorris, III, do hereby declare and say as follows:

1. I am a resident of Florida residing at 542 Sanderling Drive, Indialantic, FL 32903, USA. I am a named co-inventor in the above referenced application and have had extensive involvement with the Climate Change Industry since 2001, holding various executive (corporate) roles since early 2002.

2. Industry career highlights include:

- Seasoned speaker on project development, regulatory issues and industry challenges/solutions (partial list of speaking engagements attached);
- Founding member of Project Developers Working Group for International Emissions Trading Association (largest industry forum);
- Testified to Canadian Parliamentary sub-committee on project development issues and underlying legislative requirements;
- Interviewed multiple times by Point Carbon (leading industry journal) and Wall Street Journal;
- Founding member of UNFCCC Secretariat Developers Working Group (this position is invitation only by the United Nations);

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- Co-author of book "Global Climate Change, Project Development and Regulatory Implications" by Globe Law and Business (Globe Business Publishing Ltd.), to be published 9/2008.

3. I have held the following positions:

Forest Systems LLC Boston, MA

1/2008 to present

Vice President, Business Development & Regulatory Affairs

A founding executive of this Climate Change firm which manages forest asset class investments on behalf of pension funds, etc. Developing unique tools to enhance investment returns by balancing forest asset portfolios between conventional timber products, carbon offsets and fuel stock for alternative energy use; also developing risk mitigation tools to underwrite carbon offset transactions. Developing projects in both New Zealand and Brazil, including first large scale avoided deforestation pilot (to protect Amazon Rain Forest). Facilitating unique diplomatic cooperation between Brazilian state of Mato Grosso and New Zealand's Crown Government, so avoided deforestation projects can be 'fully recognized' at global level.

AES AgriVerde Ltd Melbourne, FL

6/2006 to 12/2007

Sr. Vice President, Regulatory Affairs

A founding executive of this Climate Change Joint Venture between AgCert International and the AES Corporation, a global energy company with annual revenues exceeding \$11B. Work pursuant to the Kyoto Protocol to establish CDM/ JI greenhouse gas (GHG) mitigation projects in SE Asia, Eastern Europe and parts of Africa. Established corporate strategy/policies/procedures, helped build/direct regional teams to cost-effectively scale GHG mitigation projects in multiple countries/sectors, managed interactions/documentation with the UNFCCC, the CDM Executive Board and JI Steering Committee, UNFCCC accredited auditors and international associations. Established numerous projects in Malaysia and Indonesia; advanced project planning in Russia, Ukraine, Poland and China.

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AgCert International plc Melbourne, FL

2002 to 6/2006

Sr. Vice President, Regulatory Affairs

9/2005 – 6/2006

Chief Operating Officer / President

2004 – 9/2005

Cofounder of this global, market-leading Climate Change firm. Developed/implemented a unique, systematic process for mitigating GHG emissions for use as emission reductions/offsets ("carbon credits"), in both regulated and unregulated global markets. Established legal entities, projects and approved methodologies in both developing and Annex I countries pursuant to Kyoto Protocol, and in N. America. During my tenure, positioned AgCert as one of world's two largest GHG project developers. Managed company's interactions with UNFCCC, the CDM Executive Board, the JI Steering Committee and UNFCCC accredited auditors. Testified in Canada's Parliament (sub-committees) and worked with Capital Hill staffers to guide nascent US climate change policy. Developed Company's pending Intellectual Property; negotiated US Government Cooperative Research & Development Agreements (CRADAs) with USDA and DOE. Working with CEO and outside legal/investor team over 7-month period, took Company public on the London Stock Exchange – one of the few US start-up companies to become full LSE listed.

4. At the request of PriceWaterhouseCoopers Canada, one of the authors of the ISO 14064, reviewed and offered suggestions for enhancement to the draft of this spec in 2003-2004. ISO 14064 promulgates standards for greenhouse gas accounting and verification by ISO (International Organization for Standardization) to provide government and industry with an integrated set of tools for programs aimed at reducing greenhouse gas emissions, as well as for emissions trading. The final spec was published on 1 March 2006.

5. A partial list of speaking engagements includes being an invited speaker to a wide variety of global climate change conferences and governmental meetings worldwide. Highlights include:

- COP/MOP (annual meeting of the UN) 2003, 2004, 2006, 2007
- UNFCCC Secretariat, Bonn, Germany 2006, 2007

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- US EPA Methane to Markets (Argentina; USA) 2006, 2007
- Canada's Parliamentary sub-committee (various) 2004, 2006
- International Emissions Trading Association 2003-2008
(several)
- GLOBE environmental conference, Canada 2004
- Consortium for Agricultural Soils Mitigation of Greenhouse
Gases (CASMGs) (various US & Canada locations) 2004-2007

6. I have made senior level presentations to several sovereign government departments and ministries:

Canada:

Department of Foreign Affairs & International Trade (DFAIT)
Agriculture and Agri-Food Canada
Parliament

USA

USDA
US EPA
US DOE
State Department

Mexico

Ministry of Agriculture
Ministry of Environment
Ministry of Foreign Affairs

Brazil

Ministry of Foreign Affairs
Ministry of Agriculture
Ministry of Environment

Chile

Ministry of Environment

Malaysia

Ministry of Environment
Ministry of Foreign Affairs

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Indonesia

Ministry of Environment
Ministry of Foreign Affairs

Peoples Republic of China

Ministry of Agriculture
Ministry of Environment

United Kingdom

Department for Environment, Food and Rural Affairs

7. I have read the Office Action of 11/16/07 for the above referenced application including the patent references cited by the Examiner including Application Publications US 2005/0246190 to Sandor et al. and 2002/0143693 to Soestbergen et al.

8. Generally with regard to Sandor, the Sandor reference cited by the Examiner is a Continuation-In-Part application filed on January 14, 2005 claiming priority to an earlier filed applications (S/N 60/397,401 f/d 7/20/2002). This earlier filed application is directed to a trading platform and an integrated registry for storing information about individual member's emissions, emission reductions, and overall compliance. Later, in applications filed after Applicants' priority dates of 11/26/2002 (S/N 60/429,267) and 1/13/2003 (S/N 60/440,069), Sandor revisions develop additional information on eligible project types and the inclusion of their associated emission reduction units into a Registry, thus giving members additional flexibility for meeting their compliance obligations.

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9. Soestbergen discloses a system and method for the banking and trading of emission reduction credits (ERCs) and a computer site for a related use. The term is similar to Applicant's term: emission reduction units. Soestbergen described its system for use in trading ERCs and registering their use.

10. In contrast, Applicants have developed a system and method for *identifying and tracking* individual emission reductions which can be created by different projects, protocols, and the like, and can then be used with either of the aforementioned inventions when the ERUs are banked, traded or sold, or alternatively can be used in conjunction with *any* bank or registry. Principally, Applicants' invention teaches a way to derive, assign and associate unique identifiers to emission reduction units (ensuring that individual emission reductions can be uniquely identified, something that cannot be done by registries that use the common practice including a simple sequenced serial number. The Applicant's claimed invention includes a unique identifier that explicitly and implicitly conveys desirable information about the emission reduction, enabling a user or prospective purchaser to discern information about the emission reduction and thus to immediately discern suitability or desirability of the appropriate kind of emission reduction.

Applicants' invention is independent of the activity and the teachings of Sandor and Soestbergen and does not need either to either create an emission reduction or to associate this reduction with a unique identifier which is specific to the creation method. In contrast however, a system according to Sandor or Soestbergen needs emission reductions, without which, the registries and trading platforms are moot. Sandor and Soestbergen teach trading, selling, and the like and do not teach

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nor suggest how to create ERCs or ERUs or how to create a method having a linked identifier to be associated with these ERCs or ERUs.

11. By way of supporting example regarding the value of the Applicants' invention and a problem solved by such, reference is made to the April 1997 release of a California Health and Safety Code (H&SC) requiring the Air Resources Board to "...develop and adopt a methodology for use by air pollution control districts to calculate the value of credits issued for surplus emissions reductions..." It later notes the "...methodology must also provide for the use of interchangeable credits in market incentive programs that are adopted..." and elsewhere says "...the proposed regulation establishes a uniform exchange mechanism for stationary, mobile and area source credits" and "To ensure that only valid credits are certified, districts must adopt calculation protocols based on criteria specified in the regulation." Of these protocols, it goes on to say "The protocols must include specific technical certification standards, emission baseline in air quality plans, and other technical information."

This 1997 document substantiates and defines the need that Applicants application applications addresses, but does so *without* giving sufficient guidance/direction to satisfy the requirement. For instance, it establishes the legal requirement for an exchange mechanism (this can be construed as a Registry, for instance) without establishing either the boundaries or issues appurtenant thereto.

After several hours recently spent reviewing the CARB site, the US EPA site and reviewing California rules and legislation, it appears there is no substantive disclosure relative to the claimed invention of Claims 1-67 appearing until 2005. In fact, there is a statement in Par IV, Discussion of Proposed Regulations" stating "While the regulation establishes the concept of an interchangeable credit, the details

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of how such credits would be generated, banked, and used or traded would be specified in district rules.” The report goes on to note that the South Coast district was developing trading rules, but it appears that no actions were taken on until the PUC announced in 2004 that they were starting to define the process.

12. Additionally, there had been a few trial projects/trades undertaken in the late 90's and early 2000's, all of which were commercial failures. These, too, define the “need” which is addressed by the invention. By way of example, GEMCO, a consortium of Canadian power companies dedicated to developing climate change solutions, widely announced in 1999 their intention to purchase Certified Emission Reduction Credits (CERCs) from Iowa farmers. This process ultimately failed, devolving into lawsuits, because GEMCO failed to define an end-to-end process for securing these credits (including a methodical process for defining ‘title’ or ‘ownership’) or for later relating individual credits to their associated projects or source locations. This latter failure clearly defines one problem solved by the Applicants and the claimed invention.

By way of further example, Registries in existing jurisdictions (all over the European Union) are suffering the use of apparently overlapping (or doubly used) serial numbers (and thence, emission reductions); something that could not occur if the Applicants’ was being used.

13. With specific reference to comments made in the 11/16/2007 Office Action, Paragraph 5. Page 3 the Examiner has the view that the specification is overly general. It also refers to the steps of Claim 1, suggesting that each sub-step needs to be fully developed.

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The specification delineates terms and phrases that have meaning to one that is familiar with pollution emissions and emission reductions, especially greenhouse gas emission reductions. What is more, the invention is not defined by an individual step (selecting a production practice, for instance: is this a chemical plant or a farming operation?) but, rather, by the inclusion of *all* of these steps. Each of these steps has a well understood context and meaning to one learned in the art.

As noted in the specification, the overall subject of emission reductions, units of emissions reduction, notional approaches for quantifying them and/or making them equivalent to each other (as a precursor to establishing uniform exchange standards) were subjects being considered in the industry, and include complex problems that had not been solved prior to Applicants' invention.

The industry was seeking ways to identify, qualify, quantify, validate and verify units that are/were real and verifiable; and also needed means to individually "identify" such units for specific use (or tracking or registration) thereafter. The end-to-end process for identifying, qualifying, validating and verifying such units with the process for individually identifying such units, once created, being the subject of the present application. This is further supported by the April 1997, California Health and Safety Code (H&SC) requirement to the Air Resources Board addressed in Paragraph 11 above.

The specification develops a number of parameters or performance attributes around which a unique identifier can be developed, also suggesting several schema for deriving characterizing portions of the identifier. These are meant to be exemplary without being overly limiting. For one familiar with the art, several logical identifiers suggest themselves.

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For instance, such identifiers can include (or be comprised of) fields that connote the production practice (ex: was this an HFC related project, a farming operation or an energy recovery project? Having the capacity to immediately distinguish between these is important. In the current European market, certain credit sources – such as forestry - have become “favored” and have higher associated pricing, whereas other sources are *not* favored – such as HFC. The EU assigns simple numerically sequential serial numbers to emission reduction units; making it impossible to identify project typology), vintage or calendar year (for instance – was this emission reduction unit derived in 2005 – prior to certain statutory issues? – or in 2007?), includes the possibility of applying temporal conversion coefficients (of use, for instance, where carbon is being sequestered in soil, trees, etc. or where long-term “permanence” may be a consideration), location or purpose, etc. The invention permits individual characterizing portions can be further encoded or encrypted to protect the information from causing commercial harm to the originating organization (that is, the organization from which the emission reductions were derived). It does not require the use of specific encryption/encoding criteria, as numerous formulae can be used to satisfy this function.

What is more, the simple (incremental numbering) scheme being used in the European Union Emissions Trading Scheme) has already shown itself to be rife with possible problems/errors. As the attached article (see **Exhibit A**) shows, hundreds of cases exist of identically numbered allowances (a form of emission reduction unit) being submitted by multiple companies in satisfaction of their statutory requirements. If they were using the Applicants' invention to identify the individual reductions, this problem could not have arisen.

Speaking further to the Examiner's opinion that the application is overly general, Legislation such as the aforementioned 1997 California Health and Safety Code (H&SC) and the Kyoto Protocol adequately define the sectors or production practices contemplated for inclusion in emission reduction regulations. Individual protocols are selected to be applicable to the specific practice. One would not, for example, use a specific methane reduction protocol (which might be applicable to livestock operations) to characterize a HydroFluoroCarbon reduction opportunity. The H&SC document observes the protocols must include specific technical elements such as emission factors, rates, etc; for one learned in the art, these would typically be derived from the **Intergovernmental Panel on Climate Change (IPCC)** reference chapters specific to the technical area.

14. With reference to Paragraph 7, Page 4 of the Office Action, The Examiner rejects Claims 1, 6, 11-12, 14-15, 17-19, 21, 22, 24-26, 28, 31, 32, 34, 40-42, 44, 46, 50, 51, 57-61, 63, 64, 67 as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In particular, the Examiner feels that the Applicants fail to describe the term "unit" with adequate detail.

With regard to units, an Emission Reduction Unit is considered a term of art and may be viewed as being analogous to a "unit of currency," by way of example. There are a wide range of such 'units' – much as there are different forms of essentially equivalent currency – such as Verified Emission Reduction units (VER), Certified Emission Reduction units (CER), Emission Reduction Units (ERUs), etc; all of which are in common use in the industry. Similarly, Applicants could have used the phrase "emission reduction credit" – but chose not to, as it is believed such

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wording would be overly restrictive when considered in terms of "allowances" that could be issued by governmental authorities. Each regulatory environment or organization that has emerged since this application was filed (CCAR, WCI, UNFCCC CDM / JI, CCX) has defined similar units (almost all of them representing 1 tonne of carbon dioxide equivalent). As a co-inventor, I can state that the Applicants challenge when drafting this application was to identify a term/phrase sufficiently generic to embrace all of the variations of such 'units' while being recognizable to one familiar with the art.

As the specification lays out a complete process for identifying, qualifying, quantifying and validating such units, to narrowly construe the term as connoting a 'factory' or literal 'production unit' is unfounded and certainly overly restrictive.

15. With reference to Paragraph 8, Page 5, Claims 7, 9, 10, 13, 20, 30, 32, 34, 39, 43, 51, 54, 56 were also rejected as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In particular, the Examiner states that the Applicants fail to adequately point out and describe what production practice or production practice data are referred to in the claims, indicating that further clarity is needed.

Just as emission reduction unit is a generic term of art to describe the universe of emission reductions, production practice is a generic term used to describe any of the various practices which can be used for the creation of emission reductions units through the application of the invention. Production practices can be as varied as a method for creating ERUs by the capture and destruction of methane, or a method which creates ERUs by replacing inefficient diesel busses with clean burning natural gas powered busses. The generic term production practice covers all methodologies

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used to capture production practice data for any method used for the creation of ERUs.

16. With reference to Paragraph 10, Page 5 of the Office Action, the Examiner explains that to be considered statutory, an invention must produce a useful, concrete, and tangible result. In this regard, the claimed invention has already shown itself to be "useful," as evidenced by the article cited in Paragraphs 10-12, above. Had the EU been using the claimed invention, each and every emission reduction unit would have been unique (for instance, even if multiple countries had used the same numbering schema to assign serial numbers, a country or location designator would have differentiated blocks of serial numbers from each other); avoiding the apparent 'double counting' problem cited in the article.

The claimed invention must produce a concrete result, wherein "Concreteness" requires specific results to be repeatable and predictable. The invention *absolutely* satisfies this requirement for a given set of characterizing portions or parameters. By way of example, reference is made to FIG. 4 of the specification depicting the following set of parameters in the characterizing portion: Protocol number (example given: methane avoidance, hogs version 1), vintage, encrypted coordinates, and a unique sequence number appurtenant to this production practice & location (while using this protocol). Using this schema, and for the number of character spaces shown, up to 9,999,999 unique identifiers may be identified for a given location/vintage using the example shown.

The claimed invention must produce a tangible result, wherein "tangibility" may be evidenced, but not limited, to a real or actual effect. The fact that identifiers are

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well accepted and are being used in the "real" world, and in association with emission reduction units, demonstrates that the claimed invention produces tangible results.

The claimed invention clearly meets all three tests cited by the Examiner.

17. With reference to Paragraph 12, Page 6 of the Office Action, Claims 1-67 were rejected under as being unpatentable over Sandor et al. (US 2002/0246190 A1) in view of Schomer (US .6,108,617).

As above addressed in Paragraph 8, the Examiner relies on the Sandor publication US 2005/0246190 as a reference. However, it is only the disclosure within Provisional Patent Application 60/397,401 filed on 7/19/02 and receiving a filing date of 7/20/02 (see **Exhibit B**) that predates the Applicants' teachings having priority dates of 11/26/02 for Provisional Application S/N 60/429,267 and 1/13/03 for Provisional Application S/N 60/440,069.

Claims 1-67 are presented in attached **Exhibit C** along with reference to selected paragraphs of Provisional Applications S/N 60/429,267 and S/N 60/440,069. Provisional Application S/N 60/429,267 is attached as **Exhibit D**. Paragraph reference numerals have been added and used in column three of the Table for ease in locating the appropriate disclosure. Provisional Application S/N 60/440,069 was originally filed with the disclosure of S/N 60/429, 267 plus diagrammatical illustrations. The illustrations are attached as **Exhibit E** including Pages 23-52. Reference is made to these illustrations by an underlining of the appropriate page number.

18. By way of example for use of the supporting material presented, attached the Table identified as **Exhibit F** makes reference to the Office Action

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paragraph in column one, the comments by the Examiner in column two, and comments made in response to the office action in column three. By way of example regarding Claims 1, 32 and 51, Paragraph 13 of the Office Action, Bullet item #1 on line one, Page 7, the rejection of, column three of the table points out that the prior art document of Sandor does not describe the selecting step identified by the Examiner.

Each comment made by the Examiner regarding the teachings of Sandor for Paragraph 13 through Paragraph 48 is similarly addressed in the Table of **Exhibit F**, hereto attached.

19. With respect to Schomer, an approach to assign serial numbers to chemicals is described to satisfy specific hazardous waste tracking requirements. The general concept of assigning identifiers is well known. Schomer's process is specific to a given need. As well, it includes a "random" section assignment of a PIN number that has no useful function in context of the claimed invention.

The Applicants' claimed invention is directed to satisfying unmet business needs of the climate change industry, not the chemical industry, and includes a parameterization process suited to pollutant emissions and emission reductions. Schomer's teachings are pertinent to the chemical industry and are expressed in units irrelevant to the pollutant emissions or emission reduction or climate change industry. While Schomer's teachings appear to satisfy a given need in the chemical industry, it would be of *no* use to the climate change industry to use his fields. The claimed invention cites a process by which unique identifiers can be assigned to emission reductions. What's more, the exemplary identifying portions of the identifier

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satisfy specific unmet identification needs that have been (and continue to be) evident in the climate change industry.

If Schomer's teachings had been 'obvious' they would be in demonstrated use and would be solving the problem. Neither has happened.

With regard to Claim 6, Schomer makes no mention of emission reduction units in his material. In contrast, the claimed invention seeks to provide the *opposite* of "limited access to the data" – rather, it is intended that *everyone* be able to access the serial number and identify the source of the emission reduction unit.

Schomer teaches the use of serial numbers, but without any of the specificity or attributes making them useable in the emissions reduction industry. As noted above, problems continue to exist with simple serialization currently employed in the emissions reduction industry.

Schomer teaches the storing of serial numbers – something well known. The invention does not seek to patent registries, but rather, the process of assigning unique identifiers (records of which can then be stored in a registry).

20. With reference to Paragraph 48, Page 18 of the Office Action, US 2002/0143693 A1 to Soestbergen et al. was presented as reading on the limitations documented in Claims 1, 32 and 51. Clearly, such is not the case.

As above discussed, and by way of further explanation, Soestbergen discloses assigning an identifier and suggests that it will be used to discern broad types of ERCs. In Soestbergen Figure 13 it observes the assignment of a unique ID. Also disclosed is a tracking between sellers & purchasers including registering a seller and assigning a unique ID value to the seller (this appears to be the principal value

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distinguishing ERCs). An emission reduction "value" is assigned to the seller. This is clearly not the subject of the claimed invention.

Indeed, assigning a summary value (rather than using an industry standard measurement like tonnes of CO₂e equivalent) teaches away from the claimed invention, and further, is not useful. Knowing problems existing in the art as earlier described, one of skill in the art would not look to the teachings of Soestbergen to solve the problem. Soestbergen teaches the use of a specific registry (embedded into the selling platform), rather than being broadly useful with no registries or multiple registries, as is the case for the claimed invention.

The Soestbergen ID is correlated to the 'registered' participant and doesn't convey useful underlying production information save (the possibility of) the broad type: sinks, solar, etc. This does not overcome the problem of registering multiple sites by the same registered participant; for instance, if AES were to register emission reduction activities at different utility sites around the country, it would result in ERCs from both regulated (RGGI, WCI or CA32) sites and unregulated sites, and would not allow for the fact that these different regions use different approved protocols and methodologies for determining a qualified reduction.

What is more, the Soestbergen approach does not contemplate allowances, but only project sourced ERs. Even if it could be interpreted to consider allowances, Soestbergen's approach would not have solved the double counting problem cited in the Point Carbon article earlier addressed with reference to **Exhibit A**.

While Soesbergen defines a need for a unique identifier, it does not suggest how to overcome market problems (determination of title, conveyance of underlying information, accommodation of all emission reduction units, including allowances, use of no registries or multiple registries, and the like), as does the claimed invention.

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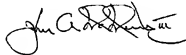
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21. I hereby declare that all statements made herein of my own accord are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that any such willful false statements may jeopardize the validity of the application or any patent issued thereon.

14 Feb 2008

Date



JOHN A. MCMORRIS, III